Supreme Court, U.S.
FILED

96 545 OCT 7 1996

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DAVID L. SMITH,

Petitioner,

v.

MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

48 pp

QUESTIONS PRESENTED FOR REVIEW

Whether by issuing her orders imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith, Judge Weinshienk, who is demonstrably biased, engaged in judicial misconduct which deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.

Whether Mr. Smith was therefore entitled, as a matter of Fifth Amendment due process of law, to have his appeal of this judicial misconduct heard and decided by a fair and impartial court of appeals.

Whether because of its previous orders and judgments imposing harsh and unjustified sanctions and discipline against Mr. Smith, and its opinion dismissing for lack of jurisdiction the appeal of the orders issued by Judge Weinshienk imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith, even though it had the authority to hear and decide the appeal pursuant to 28 U.S.C. §§ 1291, 1292(a)(1) and 1651(a), and Fed. R. App. P. 21, the Tenth Circuit's fairness and impartiality might reasonably be questioned.

Whether the Tenth Circuit was therefore obligated to disqualify itself from the case pursuant to 28 U.S.C. § 455(a).

Whether by failing or refusing to disqualify itself from the case, the Tenth Circuit again deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.

Whether the Tenth Circuit also so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Weinshienk, as to call for the exercise of the Supreme Court's power of supervision.

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No. _____

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MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

David L. Smith hereby files his petition for a writ of certiorari:

OPINIONS BELOW

Order issued by the United States Court of Appeals for the Tenth Circuit on November 29, 1993 suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado.

Order issued by the Tenth Circuit on February 13, 1996 disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order.

Order issued by the Tenth Circuit on February 16, 1996 affirming the order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order.

Opinion issued by the Tenth Circuit on July 23, 1996 dismissing for lack of jurisdiction the appeal of the orders issued by United States District Judge Zita L. Weinshienk imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith.

Order issued by the Tenth Circuit on August 29, 1996 denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 23, 1996) opinion.

JURISDICTION

28 U.S.C. § 1254 is the statute believed to confer jurisdiction on the Supreme Court of the United States to review this case on certiorari.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE

The Fifth Amendment to the Constitution of the United States provides:

> . . . [N]or shall any person be . . . deprived of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

On November 29, 1993, the United States Court of Appeals for the Tenth Circuit issued its order suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado. See In re David L. Smith, 10 F.3d 723 (10th Cir. 1993), cert. denied, ____ U.S. ____, 115 S.Ct. 53, 130 L.Ed.2d 13, (1994). Mr. Smith may apply for readmission to the Tenth Circuit bar when he can

demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied. Id.

On February 13, 1996, the Tenth Circuit issued its order disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order. See In re: David L. Smith, 76 F.3d 335 (10th Cir. 1996). Mr. Smith's petition for a writ of certiorari contesting, on Fifth Amendment due process grounds, the validity of this disbarment order is currently pending in this Court.[1] See In re: David L. Smith, No. 96-212 (filed on August 6, 1996).

On February 16, 1996, the Tenth Circuit issued its order affirming the disciplinary order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order. Mr. Smith may apply for readmission to the District Court bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied. Mr. Smith's petition for a writ of certiorari contesting, on

[1]The Tenth Circuit disbarred Mr. Smith from the practice of law in the Tenth Circuit without giving him the evidentiary hearing required by Fed. R. App. P. 46.

Fifth Amendment due process grounds, the validity of the Tenth Circuit's (February 16, 1996) order is currently pending in this Court.[2] See IN THE MATTER OF DAVID L. SMITH, No. 96-244 (filed on August 13, 1996).

On July 23, 1996, the Tenth Circuit issued its opinion dismissing for lack of jurisdiction the appeal of the orders issued by United States District Judge Zita L. Weinshienk imposing attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith, who raised and briefed the following issues on appeal:

> (1) Whether by participating (as a member of the recomposed District Court disciplinary panel) in the (February 2, 1995) decision to deny Mr. Smith's motion to continue the District Court disciplinary panel's (September 21, 1994) disciplinary order, including the provision of the order staying the Committee on Conduct's (December 8, 1993) suspension of Mr. Smith from the practice of law in the District Court,

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[2]The Tenth Circuit refused to reverse the District Court's (February 10, 1995) disciplinary order indefinitely suspending Mr. Smith from the practice of law in the District Court, which was issued on the basis of the Tenth Circuit's (November 29, 1993) order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit, even though the Tenth Circuit's (November 29, 1993) order was issued without giving Mr. Smith the evidentiary hearing required by Fed. R. App. 46.

nunc pro tunc to November 29, 1993, and in the decision to issue the (February 10, 1995) disciplinary order imposing "identical" discipline against Mr. Smith as that imposed by the Tenth Circuit disciplinary panel in its (November 29, 1993) disciplinary order, and suspending Mr. Smith from the practice of law in the District Court pursuant to D.C.COLO.LR 83.6P., Judge Weinshienk gave effect to a local rule which is unconstitutional on its face, and as applied to Mr. Smith in the District Court disciplinary action, and to Mr. Smith and his clients in pending and potential civil rights litigation, including Howard.

(2) Whether Judge Weinshienk gave effect to this unconstitutional local rule even though the procedure followed by the Tenth Circuit disciplinary panel was so lacking in notice or opportunity to be heard that it denied due process to Mr. Smith; even though imposition by the recomposed District Court disciplinary panel of the same discipline as that imposed by the Tenth Circuit disciplinary panel has resulted in grave injustice to Mr. Smith; even though the kind of misconduct (if any) established against Mr. Smith has been held by the District Court to warrant substantially less discipline; and even though Mr. Smith's attorney, Mr. Figa, has refused to represent him competently in connection with the Tenth Circuit and District Court disciplinary actions.

(3) Whether by issuing her (May 15, 1995 and July 21, 1995) orders in

Howard removing Mr. Smith as Ms. Howard's attorney and lifting the stay in Ms. Howard's civil rights case, Judge Weinshienk acted beyond the scope of the recomposed District Court disciplinary panel's (February 10, 1995) disciplinary order, which did not permit removal of Mr. Smith as attorney for his clients in pending civil rights litigation.

(4) Whether Ms. Howard and Mr. Smith were denied procedural due process of law by Judge Weinshienk's refusal to allow Mr. Smith to argue on their behalf before issuing her (May 15, 1995 and July 21, 1995) orders, which were issued without prior notice of the contemplated removal of Mr. Smith as Ms. Howard's attorney and without an opportunity to file a brief.

(5) Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by issuing her (September 7, 1995) order granting defendants' application for attorney fees and imposing attorney fee sanctions of $8,640.00 against Mr. Smith exclusively for filing and pursuing an appeal of her (June 17, 1994) order staying Ms. Howard's civil rights case "until final action is taken on the Committee on Conduct's recommendation concerning plaintiff's counsel's status," and vacating the jury trial scheduled to commence on August 1, 1994.

(6) Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by issuing her (September 7, 1995) order treating Ms. Howard's and Mr. Smith's motion to clarify status of legal representation, and notice of Ms. Howard's inability to comply with Judge Weinshienk's (July 21, 1995) amended minute order as a pro se motion for extension of time to secure new counsel, and granting the motion to September 22, 1995.

(7) Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by issuing her (September 7, 1995) order announcing that "[p]laintiff will be presumed to be handling this case pro se until new counsel enters an appearance," and that "this Court will no longer accept any papers which have been signed by Mr. Smith."

(8) Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by issuing her (September 7, 1995) order refusing to rule on Ms. Howard's and Mr. Smith's request for proper notice, an opportunity to file a brief and a hearing after the Tenth Circuit has disposed of their appeal in this case (including their petition for rehearing

and suggestion for rehearing en banc), and has issued its mandate pursuant to Fed. R. App. P. 41(a).

(9) Whether Judge Weinshienk was proceeding without or in excess of her jurisdiction when she issued her (May 15, 1995, July 21, 1995 and September 7, 1995) orders.

(10) Whether an attorney who is disbarred by a biased judge during the course of litigation is entitled to an immediate appeal and/or writ of mandamus or prohibition (i.e., whether Judge Weinshienk's orders are final appealable orders).

(11) Whether Judge Weinshienk's orders are also appealable under 28 U.S.C. §§ 1291 and/or 1292(a)(1).

The Tenth Circuit dismissed the appeal for lack of jurisdiction, even though it had the authority to hear and decide the appeal pursuant to 28 U.S.C. §§ 1291, 1292(a)(1) and 1651(a), and Fed. R. App. P. 21.

ARGUMENT

By issuing her orders imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith, Judge Weinshienk, who is demonstrably biased, engaged in judicial misconduct which deprived Mr. Smith of his liberty and property interests in his good name,

reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.[3] Mr. Smith was therefore entitled, as a matter of Fifth Amendment due process of law, to have his appeal of this judicial misconduct heard and decided by a fair and impartial court of appeals. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decisionmaker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decisionmaker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decisionmaker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). However, because of its previous orders and judgments imposing harsh and unjustified sanctions and discipline against Mr. Smith, and its opinion dismissing for lack of jurisdiction

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[3]The harsh and unjustified sanctions imposed against Mr. Smith by Judge Weinshienk were part of the alleged basis for suspending and disbarring Mr. Smith from the practice of law in the Tenth Circuit and in the District Court.

the appeal of the orders issued by Judge Weinshienk imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith, even though it had the authority to hear and decide the appeal pursuant to 28 U.S.C. §§ 1291, 1292(a)(1) and 1651(a), and Fed. R. App. P. 21, the Tenth Circuit's fairness and impartiality might reasonably be questioned. Id. The Tenth Circuit was therefore obligated to disqualify itself from the case pursuant to 28 U.S.C. § 455(a).

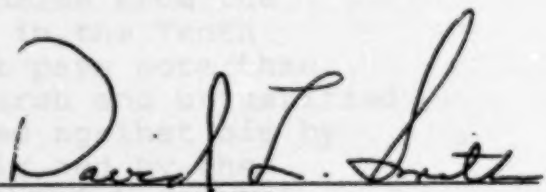
By failing or refusing to disqualify itself from the case, the Tenth Circuit again deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law. The Tenth Circuit also so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Weinshienk, as to call for the exercise of the Supreme Court's power of supervision.

V. CONCLUSION

Mr. Smith requests this Court to grant his petition for a writ of certiorari, and such other and further relief as may be just under the circumstances, including an order

declaring the orders imposing harsh and unjustified sanctions and discipline against him void ab initio.

Respectfully submitted,



DAVID L. SMITH

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APPENDIX

Order issued by the United States Court of Appeals for the Tenth Circuit on November 29, 1993 suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado A-1

Order issued by the Tenth Circuit on February 13, 1996 disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order A-4

Order issued by the Tenth Circuit on February 16, 1996 affirming the order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order A-8

Opinion issued by the Tenth Circuit on July 23, 1996 dismissing for lack of jurisdiction the appeal of the orders issued by United States District Judge Zita L. Weinshienk imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith A-11

Mr. Smith's petition for rehearing and suggestion for rehearing en banc (filed on August 5, 1996) of the Tenth Circuit's (July 23, 1996) opinion . A-22

Order issued by the Tenth Circuit on August 29, 1996 denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 23, 1996) opinion A-28

United States Court of Appeals
for the Tenth Circuit

	)	[November 29, 1993]
In re:	)	
	)	No. 93-631
David L. Smith	)	

Order

Before Seymour, Chief Judge,
Baldock and Brorby, Circuit Judges

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United

States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific Corp., ___ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is

suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the Court
Per Curiam

United States Court of Appeals
for the Tenth Circuit

	)	[February 13, 1996]
In re:	)	
	)	No. 93-631
David L. Smith	)	
	)	

Order

Before Seymour, Chief Judge,
Baldock and Brorby, Circuit Judges

On December 14, 1995, this panel entered an order requiring respondent David L. Smith to show cause why he should not be disbarred for violating this court's November 1993 suspension order and for practicing in this court without authorization. On December 20, Mr. Smith filed his response. In ruling in this matter, the court has carefully reviewed that response, as well as the other pleadings filed to date in this disciplinary action. The court has determined that Mr. Smith's transgressions warrant disbarment.

Mr. Smith's name was referred for attorney discipline after more than one panel of this court determined he was filing frivolous appeals and failing to pay court ordered sanctions. Following briefing and oral argument, this panel suspended Mr. Smith from practicing in the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct.

53 (1994). Approximately one year later, Mr. Smith filed a request for reinstatement. This panel denied that request. See Order Denying Reinstatement, No. 93-631, (10th Cir. July 18, 1995).

During the course of his suspension, Mr. Smith continued to file briefs in this court. In particular, the court has identified four appeals in which Mr. Smith appears to have drafted briefs on behalf of the allegedly pro se appellants. Those appeals are 94-1127, Qualls v. Regional Transportation District, 94-1130, Dunkin v. Louisiana-Pacific Corporation, 94-1317, Howard v. Mail-Well Envelope Company, and 95-1198, Seales v. Jefferson County School District R-1. The December 14 show cause order was the culmination of this court's efforts to have Mr. Smith explain his involvement in these appeals.

In his response, Mr. Smith readily admits, as he has before, that he wrote and submitted the briefs in this court following the issuance of our suspension order. He maintains, however, that those submissions are not in violation of this court's order because he signed two of the briefs in question and included footnotes admitting his involvement in the other two. He suggests that these admissions absolve him of any allegations of "ghost-writing." See Johnson v. Board of County Commrs., 868 F. Supp. 1226, 1231-32 (D. Colo. 1994)(discussing elements of ghost-writing). The argument follows that because he admits his assistance, he cannot be subject to discipline. Mr. Smith's arguments misperceive the nature of the problem.

Mr. Smith was advised, in very clear terms, that he no longer had permission to practice law in this court. He was told he could not act as an attorney for his clients or former clients. In writing and filing briefs on behalf of otherwise pro se litigants, he violated that order. This breach existed regardless of whether he signed the briefs or inserted footnotes. Following the suspension order, Mr. Smith was prohibited from helping his clients with their briefs.

Contrary to assertions made in the response, the court has been very careful to distinguish between efforts made on behalf of clients and Mr. Smith's right to appeal sanctions issues on his own behalf. The briefs in the four cases identified asked for relief which went far beyond Mr. Smith as an individual. In 94-1127, for example, the alleged "pro se" brief requests relief in the form of reversing the district court's dismissal of certain claims and remand for an expedited jury trial on the merits. The front cover of that brief asserts it is being submitted by Mr. Qualls, not David Smith. We find it disingenuous for Mr. Smith to urge that these briefs only contained arguments personal to him.

Despite repeated warnings, Mr. Smith has chosen not to heed the orders of this court. He is, therefore, disbarred. His name will be stricken from the list of attorneys allowed to practice in this court. In addition, in accordance with Fed. R. App. P. 35(b), Mr. Smith's suggestion for hearing en banc was circulated to all judges of the court in regular active service. No member of the panel or the court has requested a poll. Therefore, the suggestion for en banc

hearing is denied. The request for evidentiary hearing is likewise denied. Mr. Smith is referred to the office of the Circuit Executive to file any desired judicial misconduct complaint.

Entered for the Court

Per Curiam

United States Court of Appeals
for the Tenth Circuit

	)	[February 16, 1996]
	)	
IN THE MATTER OF	)	Nos. 95-1091 &
DAVID L. SMITH,	)	95-1119
	)	(D.C. No. 93-DP-28)
Attorney-Appellant.	)	(D. Colo.)
	)	

ORDER AND JUDGMENT[4]

Before Tacha, Logan, and Kelly,
Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

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[4]This order and judgment is not binding precedent, except under the doctrine of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

This appeal is from an order of the three-judge disciplinary panel of the United States District Court for the District of Colorado. Appellant Smith appeals pro se on numerous grounds relating to his suspension from the practice of law before this court and before the United States District Court for the District of Colorado. Appellant raises numerous grounds for his appeal relating to the application of local rules of the district court, the denial of due process in the procedures of that court and this court, and various allegations relating to the proceedings that resulted in suspension from the practice of law before the district court and this court.

This disciplinary matter has a long history in this court and in the district court. In November of 1993, a three-judge disciplinary panel of this court issued an order suspending appellant from the practice of law before the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993) (per curiam), cert. denied, 115 S.Ct. 53 (1994). Following his suspension before the Tenth Circuit, the United States District Court for the District of Colorado conducted hearings, took evidence, and reviewed records related to the actions underlying the disciplinary proceedings. The arguments that Mr. Smith makes again on appeal are, in large measure, a renewed effort to bring before this court matters that were determined previously in the original disciplinary proceeding. Appellant further alleges on appeal that various district court judges from the United States District Court in Colorado have imposed unjust and harsh sanctions against him. Finally, appellant urges that his counsel Mr. Figa, who has withdrawn from this case, failed to

represent appellant competently in connection with all of the disciplinary actions. We find no merit in any of the arguments made on appeal. We approve the disciplinary order issued by the district court for substantially the reasons given in its post-hearing order. This court recently disbarred Mr. Smith for his failure to abide by previously entered orders. In re Smith, No. 93-631 (10th Cir. Feb. 13, 1996) (per curiam). Continued attempts by this appellant to further litigate matters already determined by this court or foreclosed by previous determinations could result in the imposition of sanctions. AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

	)	[July 23, 1996]
LINDA C. HOWARD,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 95-1428
	)	
MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees,	)	
	)	
	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	
	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 93-D-1895)

Submitted on the briefs:[5]

Linda C. Howard, pro se for Plaintiff-Appellant and David L. Smith, pro se, Denver, Colorado, for Attorney-Appellant.

Jeffrey T. Johnson, Brian M. Mumaugh of Holland & Hart, Denver, Colorado, for Defendants-Appellees Mail-Well Envelope Company, Butler Paper Company, and Georgia-Pacific Corporation and Attorneys for Defendant-Appellee Great Northern Nekoosa Employee Protection Plan; Randall A. Constantine and Amy L. Lloyd of Elrod and Thompson, Atlanta, Georgia, for Defendant-Appellee Great Northern Nekoosa Corporation Employee Protection Plan.

Before ANDERSON, BRORBY AND HENRY, Circuit Judges

BRORBY, Circuit Judge.

Attorney David L. Smith brings this interlocutory appeal challenging the district court's order awarding appellees $8,640.00 in sanctions. For the reasons stated, we dismiss for lack of jurisdiction.

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[5]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

I

This case is but the latest chapter of the continuing saga of attorney David L. Smith. In 1993, we issued an order to show cause why Mr. Smith should not be fined, disbarred, or otherwise disciplined for filing frivolous appeals. In re Smith, 10 F.3d 723, 724 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct. 53 (1994). During oral argument on the order to show cause, Mr. Smith admitted he had not paid any of the sanctions previously imposed on him by this court and by the district court. Id. We therefore suspended him from the practice of law before the Tenth Circuit until and unless he demonstrated he had paid all of the sanctions levied against him. Id. In December 1995, we issued a second order to show cause why Mr. Smith should not be disbarred for violating this court's 1993 suspension order by drafting briefs on behalf of allegedly pro se appellants in at least four cases: Qualls v. Regional Transportation Dist., No. 94-1127; Dunkin v. Louisiana-Pacific Corp., No. 94-1130; Howard v. Mail-Well Envelope Co., No. 94-1317; and Seales v. Jefferson County Sch. Dist. R-1, No. 95-1198. In re Smith, 76 F.3d 335 (10th Cir. 1996)(per curiam). Mr. Smith admitted he had written and submitted the briefs in question. Id. at 336. We therefore ordered Mr. Smith's name be stricken from the list of attorneys allowed to practice before the Tenth Circuit. Id. The United States Supreme Court has also disbarred Mr. Smith. In re Disbarment of David L. Smith, ____ U.S. ____, 116 S.Ct. 510 (1995).

After we initially suspended Mr. Smith from practicing before this court in 1993, see In re Smith, 10 F.3d 723, the Committee on Conduct of the United States District Court for the District of Colorado took up the question of whether Mr. Smith should also be suspended from practicing before that court. Pending final action by the Committee on Conduct, the district court stayed all proceedings in this case. See Howard v. Mail-Well Envelope Co. 164 F.R.D. 524, 525 (D. Colo. 1996). Both Ms. Howard and Mr. Smith appealed the stay order, but we dismissed their appeal for lack of jurisdiction. Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. Nov. 15, 1994); see Howard, 164 F.R.D. at 525. In our order, we referred appellees' motion for sanctions on appeal to a Tenth Circuit disciplinary panel. Id. The disciplinary panel granted appellees' motion, awarded double costs and attorney fees, and remanded the case to the district court to determine the amount of attorney fees to be awarded. Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. July 18, 1995). By an order dated September 7, 1995, the district court concluded $8,640.00 in attorney fees should be awarded to the appellees, to be paid exclusively by Mr. Smith. The district court also advised Ms. Howard that Mr. Smith had been suspended from practicing law before the United States District Court for the District of Colorado, see In re Smith, No. 95-1119, 1996 WL 67191 (10th Cir. Feb. 16, 1996) (affirming district court disciplinary panel's suspension order); Howard, 164 F.R.D. at 525 (noting Mr. Smith's disciplinary status has been resolved and that he is no longer authorized to practice in the United States District Court for the District of Colorado); that

the district court would no longer accept documents signed by Mr. Smith; that she should seek new counsel; and that until she hired an attorney she would be considered to be a pro se litigant.

Both Mr. Smith and Ms. Howard appealed the September 7, 1995 order asserting a litany of errors. A jurisdictional panel of this court dismissed Ms. Howard's claims, leaving Mr. Smith as the sole appellant. Howard v. Mail-Well Envelope Co., No. 95-1428 (10th Cir. Feb. 26, 1996). The jurisdictional panel also dismissed Mr. Smith's challenge to the district court's decision to terminate his representation of Ms. Howard and to no longer accept filings signed by Mr. Smith. Id.; see Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985)(order disqualifying counsel in a civil case is not immediately appealable); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992)(revocation of permission to appear pro hac vice in a criminal case is not immediately appealable). In addition, to the extent Mr. Smith challenges the propriety of the Tenth Circuit disciplinary panel's award of double costs and attorney fees as sanctions for filing a frivolous appeal, see Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. July 18, 1995), we are without power to grant relief. See In re Smith, 10 F.3d at 724 (a three-judge panel cannot overrule the prior decision of another three-judge panel of this court). Accordingly, the only issue properly before this panel is whether the district court's calculation of the appropriate dollar amount of sanctions in the September 7, 1995, order amounted to reversible error.

II

As a threshold matter, we must determine whether we have jurisdiction over this appeal in light of the fact that Ms. Howard's case is still pending in district court. In G.J.B. & Associates, Inc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990), we "join[ed] the majority of circuit courts that have addressed the issue and [held] that a sanction order against an attorney currently of record is not a final decision for purposes of a § 1291 appeal where the underlying controversy remains unresolved." We also held such an order is not appealable under the collateral-order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), G.J.B. & Assoc., 913 F.2d at 827-29, which the Supreme Court has recently explained "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." Digital Equip. Corp. v. Desktop Direct, Inc., ____ U.S. ____, ____, 114 S.Ct. 1992, 1995 (1994)(citations omitted); Stubblefield v. Windsor Capital Group, 74 F.3d 990, 997 (10th Cir. 1996). The crux of our decision regarding the collateral-order doctrine was that the attorney may challenge the sanction order as part of an appeal from the final judgment, even if the parties settle or decline to appeal, and therefore it is not effectively unreviewable absent an interlocutory appeal. See G.J.B. & Assocs., 913 F.2d at 829 ("We reject any notion that an attorney risks losing the right to appeal if the parties settle or elect not to appeal from the final judgment"); see also Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir. 1993) (attorneys have standing to appeal orders issued

directly against them, but lack standing to appeal orders applicable only to their clients). Similarly, in Dickstein, 971 F.2d 448, we held an order revoking defense attorney Jeffrey A. Dickstein's permission to appear pro hac vice due to improper conduct was not immediately appealable, because it did not amount to a "final decision[] of the district court[]" within the meaning of 28 U.S.C. § 1291. Id. at 448. Further, as in G.J.B. & Associates, we held the challenged order was not appealable under the collateral-order doctrine because it was not effectively unreviewable through an appeal from a final judgment in the underlying case. Id. at 451. We explained that the only right defense counsel sought to vindicate in his interlocutory appeal was his reputation, which could be just as effectively rehabilitated through an appeal from a final judgment as through an interlocutory appeal, and that he did not seek to vindicate his asserted interest in continuing to represent the defendant throughout the remainder of the proceedings in the district court. Id. Most recently, in Johnson v. Board of County Comm'rs, 85 F.3d 489 (10th Cir. 1996), we exercised jurisdiction over an appeal from an order disqualifying the attorney-appellant from representing one of the parties, even though the underlying controversy had been dismissed with prejudice pursuant to a settlement agreement. We explained our cases "establish that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation.

We have no difficulty concluding the order challenged in this case does not amount to a "final decision[] of the district[] court" within the meaning of 28 U.S.C. § 1291. See Stubblefield, 74 F.3d at 995-96 (a "final decision of the district court . . . 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment'")(quoting Digital Equip., ____ U.S. ____, 114 S.Ct. at 1995 (citation and internal quotation marks omitted)). Furthermore, in light of our decisions in G.J.B. & Associates, Dickstein, and Johnson, we also conclude we lack jurisdiction over Mr. Smith's interlocutory challenge to the district court's decision under the collateral-order doctrine for three reasons: First and foremost, we see no meaningful distinction between Mr. Smith's position and that of Mr. Dickstein. As in Dickstein, Mr. Smith no longer represents a party in the litigation, but faces the stigma of a ruling that reflects negatively on his competence and conduct. However, as was also the case in Dickstein, the decision Mr. Smith now challenges may be effectively reviewed in an appeal from a final judgment, even if the parties settle their dispute or otherwise elect not to appeal.

Second, we disagree with the rationales underlying the decisions of the Third, Fifth and Seventh Circuits holding a sanction order against an attorney who no longer represents a party in the litigation is appealable under the collateral-order doctrine. See Markwell v. County of Bexar, 878 F.2d 899 (5th Cir. 1989); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 537-39 (3d Cir. 1985); Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 225-26

(7th Cir. 1984). The central thesis of these decisions is that attorneys who no longer represent parties in a case may be unable to challenge a sanction order by filing an appeal after a final judgment is entered for two reasons: first, their former clients might settle or elect not to appeal; and second, the attorney might not be notified that a final judgment has been entered given that he no longer actively participates in the litigation. Regarding the first rationale, our decisions in G.J.B. & Associates, Dickstein and Johnson make it clear an attorney may appeal a sanction or disqualification order even if his former client settles or does not appeal. Regarding the second rationale, we believe our sister circuits' analyses improperly blur the line between the impossibility of effective review necessary under the Cohen doctrine and mere inconvenience of monitoring the former client's case and performing the other tasks necessary to perfect an appeal.

Third, our cases make it clear the mere fact the sanction order in this case is currently due in full does not give rise to the type of irreparable harm justifying review under the collateral-order doctrine. In declining to adopt a blanket rule that all sanctions are immediately appealable under Cohen, this court has held, in a unanimous en banc decision, that "[a]ttorneys and parties [must] be fully aware that they must bear the burden of sanctions to the conclusion of the case and appeal on the merits of the fully adjudicated case." D&H Marketers, Inc. v. Freedom Oil & Gas, Inc., 744 F.2d 1443, 1446 (10th Cir. 1984)(en banc). We see no reason to create an exception to this general rule

and allow attorneys who no longer represent a party in the underlying case an immediate opportunity to relieve themselves of the consequences of their misconduct merely because those consequences are monetary, nor could such a holding be reconciled with our decision in G.J.B. & Assocs. We also see no reason to permit an immediate appeal under Cohen so that Mr. Smith can, without delay, attempt to somehow rehabilitate his reputation by persuading us to set aside the district court's decision. Mr. Smith's interest in promptly diminishing the stigma associated with the district court's decision is no greater than Mr. Dickstein's.

Finally, we see no basis for jurisdiction under 28 U.S.C. § 1292(a), because the challenged decision is not an injunction, or under the All Writs Statute, 28 U.S.C. § 1651, because Mr. Smith may secure adequate review through an appeal from the final judgment in the underlying case and because he has otherwise failed to make the showing required to obtain a remedy under that statute. See McNeil v. Guthrie, 945 F.2d 1163, 1165 (10th Cir. 1991)("In order to be entitled to mandamus relief, a petitioner must show a clear abuse of discretion or conduct which arbitrarily assumes and exercises authority contrary to that of the judiciary . . . Additionally, because mandamus is an extraordinary remedy, a petitioner must also show that he lacks an alternative for the relief he seeks and that his right to the writ is not in dispute"); Appeal of Licht & Semonoff, 796 F.2d 564, 573 (1st Cir. 1986)(writ of mandamus will not lie because sanction order may be reviewed on appeal from final judgment). Furthermore, the district court has not taken the steps necessary to invoke our

jurisdiction under 28 U.S.C. § 1292(b). Finally, even if we assume for the sake of discussion we would have jurisdiction if the district court had made an express finding there was "no just reason for delay" and directed entry of judgment against Mr. Smith pursuant to Fed. R. Civ. P. 54(b), which we consider to be a very great assumption indeed, the district court made no such express finding in this case.

Appeal DISMISSED. Petition for writ of mandamus or prohibition DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD,	)	
	)	
Plaintiff-Appellant-Petitioner,	)	
	)	No. 95-1428
v.	)	(D.C. No. 93-D-1895)
	)	(Dist. of Colo.)
MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees-Respondents,	)	
	)	
and,	)	
	)	
ZITA L. WEINSHIENK, United States District Judge,	)	
	)	
Respondent.	)	
	)	
----------	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant-Petitioner.	)	
	)	

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Linda C. Howard and David L. Smith hereby file their Petition for Rehearing and Suggestion for Rehearing En Banc:

I. PETITION FOR REHEARING

On July 23, 1996, a three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Anderson, Brorby and Henry, Circuit Judges) ("Disciplinary Panel II") issued its (published) opinion (copy attached hereto) dismissing for lack of jurisdiction Ms. Howard's and Mr. Smith's appeal of immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by United States District Judge Zita L. Weinshienk. These sanctions were imposed against Mr. Smith after another three-judge disciplinary panel of the Tenth Circuit (composed of Seymour, Chief Judge, Baldock and Brorby, Circuit Judges) ("Disciplinary Panel I") granted defendants-appellees' request for sanctions, imposed a sanction of double costs and attorney fees, and remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded."

In its (July 23, 1996) opinion, Disciplinary Panel II held that the immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by Judge Weinshienk were not immediately appealable under 28 U.S.C. §§ 1291, 1292(a), 1292(b), or 54(b), or under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). However, Disciplinary Panel II overlooked the fact that when Disciplinary Panel I granted defendants-appellees' request for sanctions and imposed

a sanction of double costs and attorney fees, jurisdiction over this matter was thereby vested in the Tenth Circuit. See Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990); Petuskey v. Rampton, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971). This jurisdiction was not divested when Disciplinary Panel I remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded." Id. Under these circumstances, the Tenth Circuit retained jurisdiction over this matter, and Disciplinary Panel II erred by dismissing Ms. Howard's and Mr. Smith's appeal for lack of jurisdiction.

In its (July 23, 1996) opinion, Disciplinary Panel II also denied Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, but failed to give its reasons (if any) for the denial. However, Ms. Howard and Mr. Smith had an indisputable right to a writ of mandamus or prohibition under the Tenth Circuit's holding in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975). Therefore, in the absence of any reasons for denying Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, Disciplinary Panel II deprived them of their First and Fifth Amendment right to access to the Tenth Circuit to review the actions of the district court pursuant to 28 U.S.C. § 1651 and Fed. R. Civ. P. 21.

III. SUGGESTION FOR REHEARING EN BANC

I express a belief based on a reasoned and studied professional judgment that the

panel decision is contrary to the following decisions of the Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990); Petuskey v. Rampton, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971); Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975).

I express a belief based on a reasoned and studied professional judgment that this case involves one or more questions of exceptional importance: (1) Whether the immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by Judge Weinshienk were immediately appealable under 28 U.S.C. §§ 1291, 1292(a), 1292(b), or 54(b), or under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); (2) Whether Disciplinary Panel II overlooked the fact that when Disciplinary Panel I granted defendants-appellees' request for sanctions and imposed a sanction of double costs and attorney fees, jurisdiction over this matter was thereby vested in the Tenth Circuit; (3) Whether this jurisdiction was divested when Disciplinary Panel I remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded";

(4) Whether the Tenth Circuit retained jurisdiction over this matter, and Disciplinary Panel II erred by dismissing Ms. Howard's and Mr. Smith's appeal for lack of jurisdiction; (5) Whether Ms. Howard and Mr. Smith had an indisputable right to a writ of mandamus or prohibition under the Tenth Circuit's holding in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); (6) Whether in the absence of any reasons for denying Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, Disciplinary Panel II deprived them of their First and Fifth Amendment right to access to the Tenth Circuit to review the actions of the district court pursuant to 28 U.S.C. § 1651 and Fed. R. Civ. P. 21.

Dated this 5th day of August, 1996.

Respectfully submitted,

LINDA C. HOWARD	DAVID L. SMITH
5273 Wheeling Street Denver, CO 80239 (303) 373-5666	1630 Welton Street Suite 300 Denver, CO 80202 (303) 534-0153
PLAINTIFF-APPELLANT-PETITIONER	ATTORNEY-APPELLANT-PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 1996, true and correct copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc were placed in the United States mail, postage prepaid, addressed as follows:

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 95-1428
v.	)	
	)	
MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees,	)	
	)	
	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	

ORDER
Entered August 29, 1996

Before ANDERSON, BRORBY, AND HENRY,
Circuit Judges

This matter comes on for consideration of attorney-appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: _____

Deputy Clerk

(2)

Supreme Court, U.S.
FILED
OCT 23 1996
CLERK

No. 96-545

In The

Supreme Court of the United States

October Term, 1996

DAVID L. SMITH,

Petitioner,

v.

REGIONAL TRANSPORTATION DISTRICT,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROLF G. ASPHAUG
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October 23, 1996

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QUESTIONS PRESENTED

Respondent is dissatisfied with petitioner's argumentative presentation of questions. *See* S.Ct. R. 14.1(a) (questions should not be argumentative). Respondent presents the questions as follows:

1. Whether the disqualification and sanction orders against petitioner in this matter were abuses of discretion.

2. Whether the Court of Appeals was obligated to disqualify itself from hearing this matter under 28 U.S.C. § 455(a).

3. Whether the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the District Court, in this matter as to call for the exercise of this Court's power of supervision under S. Ct. R. 10.1(a).

LIST OF PARTIES

Petitioner David L. Smith, a Colorado attorney, wants this Court to overturn the Tenth Circuit's order in *Qualls v. Regional Transp. Dist.*, 91 F.3d 159 (mem.), 1996 WL 412414 (full text of decision) (10th Cir., July 23, 1996), affirming disqualification and sanction orders against petitioner.

The original parties in this case were plaintiff James Edward Qualls and defendants Regional Transportation District, Richard Bauman, Robert Garside, Richard Reynolds, Ellsworth Walker and James Misek. In an August 31, 1992 order the District Court dismissed all defendants except the Regional Transportation District. In an October 10, 1995 order the District Court dismissed plaintiff's complaint with prejudice pursuant to a settlement agreement.

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Respondent Regional Transportation District ("RTD") respectfully requests that this Court deny the petition by David L. Smith ("Smith") for writ of certiorari.

STATEMENT OF THE CASE

I. Nature of Proceeding

This is "but the latest chapter of the continuing saga of attorney David L. Smith." *Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 434 (10th Cir. 1996).

In this proceeding Smith is asking this Court to overturn the Tenth Circuit's order affirming sanction and disqualification orders in *Qualls v. Regional Transp. Dist.*, 91 F.3d 159 (mem.), 1996 WL 412414 (full text of decision) (10th Cir., July 23, 1996). The District Court and the Tenth Circuit first imposed sanctions against Smith for abusive litigation. Then, when Smith continued to attempt to represent plaintiff James Edward Qualls ("Qualls") after the District Court disciplinary panel had suspended Smith from practice, the District Court disqualified Smith from continuing to represent Qualls.

Smith has neither appended nor even attempted to summarize the orders of which he complains, and has therefore failed to present "with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration. . . . " S. Ct. R. 14.5. This alone is "sufficient reason for denying the petition." *Id.*

RTD respectfully submits that this Court's rules do not require RTD to assume the time and expense of

reproducing the lengthy lower-court orders detailing Smith's sanctionable misconduct in this case. RTD has briefly summarized the orders below. Since Smith is complaining of the orders, he plainly had the duty to append them to his petition. (If this Court wishes RTD to provide such an appendix, RTD will of course promptly do so.)

Smith's statement of the case contains numerous misrepresentations and statements plainly not "material to the consideration of the questions presented." S. Ct. R. 24.1(g). In particular, Smith's complaints about general disciplinary proceedings against him in the Tenth Circuit and the United States District Court for the District of Colorado are not cognizable in this proceeding. *See* Petitioner's Appendix at A-1, A-4, A-8. Indeed, on two previous occasions this Court has already denied Smith's petitions for certiorari review of such proceedings. *See In re Smith*, 76 F.3d 335 (10th Cir. 1996), *cert. denied*, ___ U.S. ___, 65 U.S.L.W. 3223 (Oct. 7, 1996) (disbarring Smith from Tenth Circuit); *In re Smith*, 10 F.3d 723 (10th Cir. 1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 53, 130 L.Ed.2d 13, *reh'g denied*, ___ U.S. ___, 115 S.Ct. 615, 130 L.Ed.2d 523 (1994) (suspending Smith from Tenth Circuit). Pursuant to S. Ct. R. 15.3, RTD will not address such immaterial matters.

II. Procedural History

This proceeding began as an employment discrimination action filed by Qualls, an RTD bus driver, in June 1991 against RTD and several RTD employees in their official and individual capacities. RTD had fired Qualls for threatening a bus passenger with a knife: Qualls' second episode of threatening passengers within a few

months. A labor arbitrator upheld the discharge, finding that the evidence – including Qualls' *admitted* threat to the passenger to "carve your [testicles] off," as well as testimony from a neutral eyewitness – proved *beyond a reasonable doubt* that Qualls was guilty of the charge. Smith was Qualls' attorney. (Neither Qualls' union nor the arbitrator were named as defendants.)

The following is only a very limited, selective summary of the tortuous proceedings in this matter.

On August 31, 1992, the District Court granted defendants' Fed. R. Civ. P. 12 motions to dismiss all of Qualls' claims except for his Title VII claim against RTD. On September 2, 1992, in a misguided attempt to obtain immediate appellate review, Qualls moved to dismiss his remaining Title VII claim. On September 8, 1992 and December 10, 1992, the District Court ordered that ruling would be reserved on Qualls' motion in order to provide Qualls with an opportunity to reconsider his motion. Ultimately Qualls did reconsider, and withdrew his motion.

Discovery thereupon commenced and quickly became problematic. On July 8, 1993, the United States District Court Magistrate Judge granted RTD's motion for sanctions, finding that Smith had engaged in a wide variety of abusive discovery and litigation tactics. As further discussed below, the Magistrate Judge's order catalogued Smith's misconduct in detail. On August 2, 1993, the District Court denied Smith's motion for reconsideration of the Magistrate Judge's order.

On October 19, 1993, the Magistrate Judge assessed further sanctions against Smith for additional abusive

litigation. On November 4, 1993, the District Court denied Smith's motion for reconsideration of the additional sanctions.

On January 28, 1994, the Magistrate Judge determined that Smith was to pay $8,187.50 pursuant to the above sanction orders. The amount was to be paid by February 28, 1994.

On February 16, 1994, in response to Smith's suspension from practice in the Tenth Circuit Court of Appeals, the District Court stayed proceedings in the case to permit clarification of Smith's District Court status under the District's reciprocal-discipline rules. On March 17, 1994, Smith filed an interlocutory appeal (No. 94-1127) contesting the District Court's stay. On June 17, 1994, the District Court entered an order continuing the stay, and on July 15, 1994 Smith filed a second interlocutory appeal (No. 94-1314) contesting the order continuing the stay.

On September 14, 1994, the Tenth Circuit dismissed Smith's appeal No. 94-1127 as jurisdictionally defective. On October 11, 1994, the District Court lifted its stay. On January 6, 1995, the Tenth Circuit dismissed Smith's second appeal (No. 94-1314) as jurisdictionally defective.

On January 17, 1995, despite the fact that the District Court had *already* lifted its stay *three months earlier*, Smith filed a petition for writ of certiorari in this Court concerning his first appeal of the stay (No. 94-1127). This Court denied Smith's petition, granted RTD's motion for damages and double costs, and awarded RTD $500 as damages and costs. *Qualls v. Regional Transp. Dist.*, ___ U.S. ___, 115 S.Ct. 1328, 131 L.Ed.2d 207, *reh'g denied*, ___ U.S. ___, 115 S.Ct. 1992, 131 L.Ed.2d 878 (1995). When Smith

refused to pay the $500 as ordered by this Court, this Court first granted RTD's motion to show cause, *Qualls v. Regional Transp. Dist.*, ___ U.S. ___, 116 S.Ct. 47, 113 L.Ed.2d 13 (1995), and then disbarred Smith. *In re Smith*, ___ U.S. ___, 116 S.Ct. 510, 133 L.Ed.2d 420 (1995), *reh'g denied*, ___ U.S. ___, 116 S.Ct. 801, 133 L.Ed.2d 420, *m. to recall and amend denied*, ___ U.S. ___, 116 S.Ct. 1257, 134 L.Ed.2d 206 (1996).

Meanwhile, on February 10, 1995, the United States District Court for the District of Colorado suspended Smith from practice. On May 2, 1995, the District Court Disciplinary Panel denied Smith's motion to reconsider the suspension.

On May 15, 1995, the District Court issued orders in this proceeding disqualifying Smith from further representing Qualls due to Smith's suspension, and staying Qualls' District Court case for one month to enable Qualls to obtain new counsel. On June 13, 1995, Smith filed an interlocutory appeal (No. 95-1246) contesting his disqualification.

On July 18, 1995, the Tenth Circuit granted RTD's motion for sanctions and double costs in connection with Smith's second interlocutory appeal (*i.e.*, No. 94-1314, the appeal of the order merely continuing the stay), and remanded the matter to the District Court to determine the amount of attorney fees on appeal to be awarded.

On July 31, 1995, the District Court denied Smith's motion for reconsideration of the Magistrate Judge's January 28, 1994 order awarding $8,187.50 in sanctions for abusive discovery and litigation tactics in District Court.

On August 10, 1995, pursuant to the Tenth Circuit's July 18, 1995 order, the District Court awarded further sanctions of $1,187.50 against Smith for filing a frivolous appeal.

On August 30, 1995, Smith filed his fourth interlocutory appeal in this matter (No. 95-1385).

On September 29, 1995, Qualls and RTD settled Qualls' claims. On October 10, 1995, pursuant to the settlement agreement, the District Court dismissed Qualls' complaint with prejudice.

On October 27, 1995, Smith filed a fifth notice of appeal (No. 95-1459). On November 24, 1995, Smith filed a sixth notice of appeal (No. 95-1489).

On April 12, 1996, the Tenth Circuit dismissed appeal No. 95-1246 and consolidated the three remaining appeals (Nos. 95-1385, 95-1459, and 95-1489). On July 23, 1996, the Tenth Circuit affirmed the disqualification and sanction orders, dismissed all remaining contentions, and denied Smith's petitions for writ of mandamus or prohibition. On August 29, 1996 the Tenth Circuit denied Smith's petition for rehearing.

Smith has never paid any of the sanctions assessed against him in this and other proceedings brought by him against RTD.

SUMMARY OF ARGUMENT

No reasons exist for granting the writ. *See* S. Ct. R. 10.1. To the contrary, the Court should summarily deny the petition.

In his two-paragraph argument, Smith merely asserts – with no explanation whatsoever – that the sanction and disqualification orders were "harsh and unjustified" and that the District Court judge was "demonstrably biased" and had engaged in "judicial misconduct." Smith's failure to supply this Court with the orders in question, or even a semblance of an argument as to *why* or *how* the orders were in any way improper, is a compelling reason to deny the petition. S. Ct. R. 10.5.

Smith further asserts that the Tenth Circuit's impartiality is reasonably in question, and that the Tenth Circuit was therefore "obligated" to disqualify itself from the case pursuant to 28 U.S.C. § 455(a), "because of its previous orders and judgments imposing harsh and unjustified sanctions against Smith, and its refusal to provide a statement of reasons, addressing the issues raised and briefed on appeal. . . . " However, it is well-recognized that disqualification is "almost never" required merely because the court has previously ruled against a litigant. *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474, 490 (1994).

ARGUMENT

I. The Lower Courts' Orders Were Not Abuses of Discretion

A. The District Court's December 10, 1992 Order Was Appropriate

Disregarding Smith's complaints concerning disciplinary action against him (which are not reviewable in

this proceeding), Smith first appears to be seeking certiorari review of the District Court's December 10, 1992 order on the ground that the order allegedly constituted improper "sanctions" as well as "unsubstantiated attacks on his professional character, judgment and reputation." *See* Petition at 6.

After the District Court had dismissed all but Qualls' Title VII claim, Smith first moved to dismiss the remaining Title VII claim without prejudice so that he could immediately appeal the dismissal order. After the District Court in a September 8, 1992 order noted that recent Tenth Circuit caselaw appeared to foreclose an immediate appeal under such circumstances, Smith moved to dismiss his client's remaining Title VII claim *with prejudice* in order to take an immediate appeal of all claims. In its polite and reasonable December 10, 1992 order, the District Court understandably sought further confirmation "that plaintiff understands that he may be relinquishing his right to assert a Title VII claim, even in the event his other claims are reinstated by the Tenth Circuit." The District Court also "cautioned" Smith concerning his on-the-record refusal to read cases cited by the Court and "the tenor of counsel's complaints regarding the propriety of the decisions made by Judges in this District and the Tenth Circuit. . . . "

Ultimately Smith and Qualls did in fact reconsider their motions to dismiss the Title VII claim.

These District Court orders were, if anything, a favor to Smith and his client. Had the District Court granted

Smith's motion to dismiss with prejudice Qualls' remaining Title VII claim, Qualls would thereupon have permanently relinquished his Title VII claim even if Qualls had prevailed in seeking reversal of the District Court's other holdings. Moreover, Smith has failed to explain how any of the statements by the District Court in its order were in any way erroneous, or how they could reasonably be considered "sanctions" or an "attack" on Smith's character, judgment or reputation.

B. The District Court's Sanctions Against Smith Were Justified

The District Court's reasons for imposing sanctions against Smith were set forth in exhaustive detail in the Magistrate Judge's July 8, 1993 order. Among other things, Smith had (to quote from the 20-page order):

- "misled the Court, wasted defense counsel's time, and cost the deponents time and money" by unilaterally cancelling depositions of defendants within three hours after a court hearing in which the Magistrate Judge had set dates and times for the depositions;
- filed "plainly overbroad" and "absurd" requests for production;
- "violated Fed. R. Civ. P. 11 through his pleadings, conduct in court, conduct toward opposing counsel and actions toward the court";
- continually filed motions "without legal authority and with faulty legal reasoning, if any at all";
- "misstat[ed] facts, fail[ed] to cite authority and [failed to be] responsive to Court

inquiries," thus demonstrating "insolence" during oral argument;

- "insisted that he needed documents before he could proceed with . . . depositions when nineteen personnel files had been sitting at RTD's office for Mr. Smith to inspect but he had not yet done so";
- contended that "a Magistrate Judge's decision is not authority";
- "misstated Defendant's objections to discovery as privilege objections, when they clearly were not";
- claimed that he "repeatedly" gave the Magistrate Judge information during oral argument "when the transcript clearly shows otherwise";
- "continuously misrepresented what opposing counsel had just argued minutes before" in oral argument;
- "taken attorney congeniality, cooperation and civility to a new low" by failing to cooperate with opposing counsel on scheduling and other matters; and
- "refused to address correspondence to new lead counsel [for defendant] until this Court ordered him to do so."

Aside from making conclusory assertions that the sanctions against him were "harsh and unjustified," Smith has utterly failed before the District Court, the Tenth Circuit, and now this Court to explain *why* or *how* the Magistrate Judge's July 8, 1993 order, and the above findings of fact, were in any way incorrect let alone an

abuse of discretion sufficient to justify reversal on appeal. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (standard of review of Fed. R. Civ. P. 11 sanctions is abuse of discretion).

Smith claims that the District Court "grossly abused" its discretion or otherwise acted improperly by allegedly "rubber-stamping" the Magistrate Judge's sanction order. Petition at 9. However, Smith has failed to explain why the District Court's order denying his motion for reconsideration of the above sanctions was incorrect.

When the Magistrate Judge thereafter fixed the amount of sanctions at $8,187.50, the Magistrate Judge explained why this amount was appropriate. The amount was supported by an affidavit of fees. Smith bore the burden to explain how the Magistrate Judge's orders were in any way erroneous, but he has never done so before any court.

Finally, the District Court was not required to vacate previously-imposed sanctions when the underlying case was settled. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S.Ct. 386, 393, 130 L.Ed.2d 233 (1994) (settlement of case on appeal does not entitle parties to order vacating lower-court judgment which is subject of appeal); *Dunkin v. Louisiana-Pacific Corp.*, 159 F.R.D. 554, 555 (D. Colo. 1995) (another case involving Smith; parties may not, as part of settlement, agree to vacate sanctions against Smith).

C. The District Court's May 15, 1995 Orders Disqualifying Smith from Representing Qualls Were Justified

Smith argues that the District Court's May 15, 1995 disqualification orders must be overturned because the District Court disciplinary panel's February 10, 1995 order suspending him from practice "did not permit removal of Mr. Smith as attorney for his clients in pending civil rights litigation." Petition at 7. The argument is groundless, frivolous and patently absurd. After he was suspended from practice in the District Court, Smith obviously was obliged to cease representing clients in pending civil rights litigation in that court. Unfortunately, Smith failed to recognize his duty to withdraw as counsel of record after he was suspended from practice, and the District Court was therefore forced to bar Smith from further representing Qualls in this proceeding. (In fact, Smith admittedly continued to "ghost-write" Tenth Circuit briefs for Qualls and other clients in plain violation of the Tenth Circuit's suspension order; he was ultimately disbarred by the Tenth Circuit for that reason.)

D. The Appellate Sanctions Were Justified

In awarding further sanctions of $1,187.50, the District Court was merely obeying the Tenth Circuit's July 18, 1995 order in appeal No. 94-1314 imposing sanctions against Smith.

Smith does not explain why the Tenth Circuit's order was erroneous. The appeal – of an order continuing a stay which had already been appealed – was dismissed as plainly jurisdictionally defective. Moreover, by the time

of this appeal Smith had already been suspended from practice in the Tenth Circuit, yet he was still preparing and filing matters in the Tenth Circuit as Qualls' attorney.

Given the amount of work necessitated by any appeal, an award of $1,187.50 in sanctions could hardly be classified as unreasonable. The amount was supported by an affidavit of fees.

II. The Tenth Circuit Was Not Obligated to Disqualify Itself

Smith claims that the entire Tenth Circuit was required to disqualify itself pursuant to 28 U.S.C. § 455(a) because the impartiality of the Circuit's member judges might reasonably be questioned. However, Smith has failed to provide any rational explanation for his claim.

The only basis cited by Smith for questioning the Tenth Circuit judges' impartiality in this matter is the Tenth Circuit's "previous orders and judgments" against Smith. Petition at 11. He has cited no extrajudicial sources of alleged bias. However,

> judicial rulings alone almost never constitute valid basis for a bias or partiality motion. . . . In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.

Liteky v. United States, 114 S.Ct. at 1157.

Smith has provided no explanation as to why this case should be an exception to the above rule.

III. This Court's Supervisory Power Is Not Required

Smith has failed to articulate any reasonable basis for his extraordinary request that this Court exercise its supervisory powers under S. Ct. R. 10.1(a). Smith's stated basis for invoking the Court's supervisory power is the Tenth Circuit's "failing or refusing to disqualify itself from the case. . . . " Petition at 11. However, as shown above, there is no basis for disqualification of the Tenth Circuit.

IV. Request for Award of Just Damages and Double Costs

Smith has made grave accusations of "judicial misconduct" and "demonstrable bias" by the District Court with no reasonable explanation and no proffered evidence. Smith has also failed to provide any rational basis for his demand that the entire Tenth Circuit disqualify itself, or that this Court exercise supervisory jurisdiction over the Tenth Circuit.

This is the second frivolous and groundless petition for certiorari which Smith has filed in this matter. Smith was disbarred by this Court for refusing to pay the $500 in sanctions assessed by this Court for his first petition. Even though this latest petition is again meritless, RTD nevertheless has an obligation to respond pursuant to

S. Ct. R. 15.1. RTD therefore again requests an award of just damages and double costs pursuant to S. Ct. R. 42.2.

CONCLUSION

For the reasons presented above, RTD requests that the Court deny certiorari and award RTD just damages and double costs.

Respectfully submitted,

ROLF G. ASPHAUG
Counsel of Record
Attorney for Respondent

(3)

Supreme Court, U.S.
FILED
NOV 1 1996
CLERK

No. 96-545

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DAVID L. SMITH,

Petitioner,

v.

REGIONAL TRANSPORTATION DISTRICT, RICHARD BAUMAN, ROBERT GARSIDE, RICHARD REYNOLDS, ELLSWORTH WALKER, JAMES MISEK,

Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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On or about October 23, 1996, the attorney for respondent Regional Transportation District, Rolf G. Asphaug, filed his brief in opposition to petition for a writ of certiorari, asserting that "Smith's failure to supply this Court with the orders in question, or even a semblance of an argument as to why or how the orders were in any way improper, is a compelling reason to deny the petition." However, Mr. Smith supplied this Court with the following orders: (1) Order issued by the United States Court of Appeals for the Tenth Circuit on November 29, 1993 suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado; (2) Order issued by

the Tenth Circuit on February 13, 1996 disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order; (3) Order issued by the Tenth Circuit on February 16, 1996 affirming the order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order; (4) Order and judgment issued by the Tenth Circuit on July 23, 1996 affirming the orders issued by United States District Judge Zita L. Weinshienk imposing immediately payable attorney fees and costs of approximately $9,500.00, and other harsh and unjustified sanctions, against Mr. Smith; and, (5) Order issued by the Tenth Circuit on August 29, 1996 denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 23, 1996) order and judgment. (See Appendix to Petition for a Writ of Certiorari, at pages A-1 through A-14, and A-23 through A-24.)

Mr. Smith summarized Judge Weinshienk's other orders as follows: (1) Judge Weinshienk's (December 10, 1992) order which severely attacked, reprimanded and warned Mr. Smith for seeking dismissal with prejudice of Mr. Qualls' remaining Title VII claim so that an appeal of his improperly dismissed claims under 42 U.S.C. §§ 1981, 1983, 1985(3) and 1986 could be taken to the United States Court of Appeals for the Tenth Circuit, and which was issued without giving Mr. Smith prior notice that attorney sanctions were being considered, and without giving him the opportunity to file a brief or otherwise respond to Judge Weinshienk's unsubstantiated attacks on his professional

character, judgment and reputation; (2) Judge Weinshienk's (February 2, 1995) order denying Mr. Smith's motion to continue her (September 21, 1994) disciplinary order, including the provision of the order staying the Committee on Conduct's (December 8, 1993) suspension of Mr. Smith from the practice of law in the District Court, nunc pro tunc to November 29, 1993; (3) Judge Weinshienk's (February 10, 1995) disciplinary order imposing "identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit disciplinary panel in its (November 29, 1993) disciplinary order, and suspending him from the practice of law in the District Court pursuant to D.C.COLO.LR 83.6P.; (4) Judge Weinshienk's (May 15, 1995) orders which removed Mr. Smith as Mr. Qualls' attorney and lifted the stay in Mr. Qualls' civil rights case, and which were issued without prior notice of the contemplated removal of Mr. Smith as Mr. Qualls' attorney and without an opportunity for them to file a brief; (5) Judge Weinshienk's (July 31, 1995) order denying Mr. Qualls' and Mr. Smith's motion for reconsideration of Magistrate Judge Abram's (January 28, 1994) order imposing harsh and unjustified sanctions of $8,187.50 against Mr. Smith for filing alleged "frivolous" discovery motions, and requiring him to pay this amount to Defendant-Appellee Regional Transportation District by no later than February 28, 1994; (6) Judge Weinshienk's (August 10, 1995) order granting Defendants' Motion for Attorney Fees, determining that the reasonable amount of attorney fees for filing the interlocutory appeal in Qualls was $1,187.50, and ordering Mr. Smith to pay this amount to Defendants-Appellees pursuant to the Tenth Circuit disciplinary panel's (July 18, 1995) order. (See Appendix to Petition for a Writ of Certiorari, at pages

A-16 through A-18.)

Finally, Mr. Smith advised this Court that he raised and briefed the following issues on appeal: (1) Whether Judge Weinshienk's arbitrary, discriminatory and otherwise improper application of the Rule 56 summary judgment procedure and standard deprived Mr. Qualls of his First Amendment right to petition the government for a redress of grievances, as well as his Seventh Amendment right to a jury trial; (2) Whether Judge Weinshienk issued her (December 10, 1992) order without giving Mr. Smith prior notice that attorney sanctions were being considered, and without giving him the opportunity to file a brief or otherwise respond to her unsubstantiated attacks on his professional character, judgment and reputation; (3) Whether by participating (as a member of the recomposed District Court disciplinary panel) in the (February 2, 1995) decision to deny Mr. Smith's motion to continue the District Court disciplinary panel's (September 21, 1994) disciplinary order, including the provision of the order staying the Committee on Conduct's (December 8, 1993) suspension of Mr. Smith from the practice of law in the District Court, nunc pro tunc to November 29, 1993, and in the decision to issue the (February 10, 1995) disciplinary order imposing "identical" discipline against Mr. Smith as that imposed by the Tenth Circuit disciplinary panel in its (November 29, 1993) disciplinary order, and suspending Mr. Smith from the practice of law in the District Court pursuant to D.C.COLO.LR 83.6P., Judge Weinshienk gave effect to a local rule which is unconstitutional on its face, and as applied to Mr. Smith in the District Court disciplinary action, and to Mr. Smith and his clients in pending and potential civil rights litigation, including

Qualls; (4) Whether Judge Weinshienk gave effect to this unconstitutional local rule even though the procedure followed by the Tenth Circuit disciplinary panel was so lacking in notice or opportunity to be heard that it denied due process to Mr. Smith; even though imposition by the recomposed District Court disciplinary panel of the same discipline as that imposed by the Tenth Circuit disciplinary panel has resulted in grave injustice to Mr. Smith; even though the kind of misconduct (if any) established against Mr. Smith has been held by the District Court to warrant substantially less discipline; and even though Mr. Smith's attorney, Mr. Figa, has refused to represent him competently in connection with the Tenth Circuit and District Court disciplinary actions; (5) Whether by issuing her (May 15, 1995) orders in Qualls removing Mr. Smith as Mr. Qualls' attorney and lifting the stay in his civil rights case, Judge Weinshienk acted beyond the scope of the recomposed District Court disciplinary panel's (February 10, 1995) disciplinary order, which did not permit removal of Mr. Smith as attorney for his clients in pending civil rights litigation; (6) Whether such permission would constitute an impermissible ex post facto or retroactive application of D.C.COLO.LR 83.6P.; would impermissibly interfere with Mr. Smith's right to represent his clients in accordance with the terms of their contingent fee agreements; and would impermissibly interfere with Mr. Smith's clients' First Amendment rights to pursue federal civil rights litigation; (7) Whether this was especially true for Mr. Qualls, who was financially unable to hire substitute counsel, and was incompetent to proceed pro se against experienced defense counsel; (8) Whether even if the District Court disciplinary panel's (February 10,

1995) disciplinary order permitted Judge Weinshienk to remove Mr. Smith as attorney for his clients in pending federal civil rights litigation, this could not be done without affording procedural due process of law; (9) Whether Mr. Qualls and Mr. Smith were denied procedural due process of law by Judge Weinshienk's refusal to allow Mr. Smith to argue on their behalf before issuing her (May 15, 1995) orders, which were issued without prior notice of the contemplated removal of Mr. Smith as Mr. Qualls' attorney and without an opportunity to file a brief; (10) Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by issuing her (June 16, 1995) order refusing to disqualify herself from the case pursuant to 28 U.S.C. § 455(a); (11) Whether by rubber-stamping Magistrate Judge Abram's sanction order, Judge Weinshienk again grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice; (12) Whether Mr. Qualls and Mr. Smith were entitled to an immediate appeal or writ of mandamus or prohibition under the exception to the final judgment rule established by the Tenth Circuit in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); (13) Whether Judge Weinshienk's orders were also appealable under the "plain language" of 28 U.S.C. § 1292(a)(1), which permits immediate appeals of rulings relating to injunctions, including stays; (14) Whether Judge Weinshienk's orders were appealable under 28 U.S.C. § 1291; (15) Whether the contradiction between the (September 29, 1995) Stipulation of Dismissal With Prejudice and the (September

29, 1995) Settlement Agreement and Full and Final Release evidenced a fraud on Mr. Smith and/or the Court; (16) Whether Judge Weinshienk's (October 10, 1995) Order of Dismissal is null and void; (17) Whether by returning Mr. Smith's motions to him on the alleged basis that "Mr. Smith was never made a party to this case by the Court," Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice; (18) Whether Judge Weinshienk also engaged in judicial misconduct pursuant to 28 U.S.C. § 372(c). (See Petition for a Writ of Certiorari, at pages 5-10; see also Appendix to Petition for a Writ of Certiorari, at pages A-18 through A-20.)

Under these circumstances, Mr. Smith has supplied this Court with the "orders in question," and has made an argument for "how and why the orders are improper." Mr. Asphaug, on the other hand, has failed to supply this Court with any documentation, much less any orders, to support his "very limited, selective summary of the tortuous proceedings in this matter," or to support his entirely unsubstantiated (and therefore frivolous) arguments that (1) the lower courts' orders were not abuses of discretion; (2) the Tenth Circuit was not obligated to disqualify itself; and, (3) this Court's supervisory power is not required.

Contrary to Mr. Asphaug's assertions, the Tenth Circuit's previous orders and judgments imposing harsh and unjustified sanctions and discipline against Mr. Smith are not his only basis for arguing that the Tenth Circuit's fairness and impartiality might reasonably be questioned, and that the Tenth Circuit was therefore obligated to

disqualify itself from the case pursuant to 28 U.S.C. § 455(a). Mr. Smith also bases his argument on the Tenth Circuit's refusal to provide a statement of reasons, addressing the issues raised and briefed on appeal, for its order and judgment affirming the orders issued by Judge Weinshienk imposing immediately payable attorney fees and costs of approximately $9,500.00, and other harsh and unjustified sanctions, against Mr. Smith. By failing or refusing to disqualify itself from the case under these circumstances, the Tenth Circuit again deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law. The Tenth Circuit also so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Weinshienk, as to call for the exercise of the Supreme Court's power of supervision.

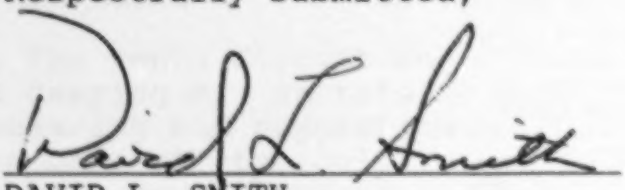
Attached hereto as part of a supplemental appendix is the opinion issued by the Tenth Circuit on July 23, 1996 dismissing for lack of jurisdiction the appeal of the orders issued by Judge Weinshienk in Howard v. Mail-Well Envelope Company, et al., imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith in that case, even though the Tenth Circuit had the authority to hear and decide the appeal pursuant to 28 U.S.C. §§ 1291(a)(1) and 1651(a), and Fed. R. App. P. 21. This opinion, which is pending before this Court on Mr. Smith's petition for a writ of certiorari, is further graphic evidence of the Tenth Circuit's bias against Mr. Smith, and of the need for the exercise

of this Court's power of supervision.

Mr. Asphaug has joined a request for award of just damages and double costs with his brief in opposition to petition for a writ of certiorari, in blatant violation of Sup. Ct. R. 15.3. This is not the first time that Mr. Asphaug, in his eagerness to provoke this Court into imposing harsh and unjustified sanctions and discipline against Mr. Smith, has violated Sup. Ct. R. 15.3. On or about February 15, 1995, Mr. Asphaug joined a similar request for award of just damages and double costs with his brief in opposition to a previous petition for a writ of certiorari filed by Mr. Smith in this case. Although Mr. Asphaug's request was in violation of Sup. Ct. R. 15.3., and although Mr. Smith was not served with a copy of Mr. Asphaug's subsequent separate motion for award of just damages and double costs, this Court granted Mr. Asphaug's request and motion at the same time it denied Mr. Smith's petition for a writ of certiorari, imposed sanctions of $500.00 against Mr. Smith for filing what Mr. Asphaug claimed was a "frivolous" petition for a writ of certiorari, and ordered Mr. Smith to pay this amount to Mr. Asphaug within 21 days. When Mr. Smith failed to pay Mr. Asphaug as ordered by this Court, he was disbarred from practice in this Court without being afforded the hearing required by Sup. Ct. R. 8, even though material facts were in dispute on the defenses raised by Mr. Smith in his verified response to the order to show cause issued by the Clerk of this Court. Mr. Smith's petition for rehearing and motion to recall and amend judgment were also denied. Mr. Smith is now being prosecuted by the Supreme Court of Colorado on reciprocal discipline charges based on this Court's order of disbarment.

Neither of Mr. Smith's petitions for a writ of certiorari are "frivolous," as charged by Mr. Asphaug. Both petitions are warranted by existing law or by an argument for the extension, modification or reversal of existing law, or the establishment of new law. Both petitions are based on the existence of an adequate factual foundation. Under these circumstances, imposition of harsh and unjustified sanctions and discipline against Mr. Smith for exercising his First Amendment right to petition this Court for a redress of grievances is unwarranted. See Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985). Furthermore, since no other litigants or their attorneys have been punished in this manner, imposition of such sanctions and discipline against Mr. Smith is detrimental to the fair and impartial administration of justice.

Respectfully submitted,



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PRO SE ATTORNEY-PETITIONER

SUPPLEMENTAL APPENDIX

Opinion issued by the Tenth Circuit on July 23, 1996 dismissing for lack of jurisdiction the appeal of the orders issued by Judge Weinshienk in Howard v. Mail-Well Envelope Company, et al., imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith in that case, even though the Tenth Circuit had the authority to hear and decide the appeal pursuant to 28 U.S.C. §§ 1291(a)(1) and 1651(a), and Fed. R. App. P. 21 . . . . . SA-1

Mr. Smith's petition for rehearing and suggestion for rehearing en banc (filed on August 5, 1996) of the Tenth Circuit's (July 23, 1996) order and judgment in Howard v. Mail-Well Envelope Company, et al. SA-12

Order issued by the Tenth Circuit on August 29, 1996 denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 23, 1996) opinion in Howard v. Mail-Well Envelope Company, et al. . SA-18

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

	)	[July 23, 1996]
LINDA C. HOWARD,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 95-1428
	)	
MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees,	)	
	)	
---	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	
	)	

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 93-D-1895)

Submitted on the briefs:[1]

Linda C. Howard, pro se for Plaintiff-Appellant and David L. Smith, pro se, Denver, Colorado, for Attorney-Appellant.

Jeffrey T. Johnson, Brian M. Mumaugh of Holland & Hart, Denver, Colorado, for Defendants-Appellees Mail-Well Envelope Company, Butler Paper Company, and Georgia-Pacific Corporation and Attorneys for Defendant-Appellee Great Northern Nekoosa Employee Protection Plan; Randall A. Constantine and Amy L. Lloyd of Elrod and Thompson, Atlanta, Georgia, for Defendant-Appellee Great Northern Nekoosa Corporation Employee Protection Plan.

Before ANDERSON, BRORBY AND HENRY, Circuit Judges

BRORBY, Circuit Judge.

Attorney David L. Smith brings this interlocutory appeal challenging the district court's order awarding appellees $8,640.00 in sanctions. For the reasons stated, we dismiss for lack of jurisdiction.

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[1]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

I

This case is but the latest chapter of the continuing saga of attorney David L. Smith. In 1993, we issued an order to show cause why Mr. Smith should not be fined, disbarred, or otherwise disciplined for filing frivolous appeals. In re Smith, 10 F.3d 723, 724 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct. 53 (1994). During oral argument on the order to show cause, Mr. Smith admitted he had not paid any of the sanctions previously imposed on him by this court and by the district court. Id. We therefore suspended him from the practice of law before the Tenth Circuit until and unless he demonstrated he had paid all of the sanctions levied against him. Id. In December 1995, we issued a second order to show cause why Mr. Smith should not be disbarred for violating this court's 1993 suspension order by drafting briefs on behalf of allegedly pro se appellants in at least four cases: Qualls v. Regional Transportation Dist., No. 94-1127; Dunkin v. Louisiana-Pacific Corp., No. 94-1130; Howard v. Mail-Well Envelope Co., No. 94-1317; and Seales v. Jefferson County Sch. Dist. R-1, No. 95-1198. In re Smith, 76 F.3d 335 (10th Cir. 1996)(per curiam). Mr. Smith admitted he had written and submitted the briefs in question. Id. at 336. We therefore ordered Mr. Smith's name be stricken from the list of attorneys allowed to practice before the Tenth Circuit. Id. The United States Supreme Court has also disbarred Mr. Smith. In re Disbarment of David L. Smith, ____ U.S. ____, 116 S.Ct. 510 (1995).

After we initially suspended Mr. Smith from practicing before this court in 1993, see In re Smith, 10 F.3d 723, the Committee on Conduct of the United States District Court for the District of Colorado took up the question of whether Mr. Smith should also be suspended from practicing before that court. Pending final action by the Committee on Conduct, the district court stayed all proceedings in this case. See Howard v. Mail-Well Envelope Co. 164 F.R.D. 524, 525 (D. Colo. 1996). Both Ms. Howard and Mr. Smith appealed the stay order, but we dismissed their appeal for lack of jurisdiction. Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. Nov. 15, 1994); see Howard, 164 F.R.D. at 525. In our order, we referred appellees' motion for sanctions on appeal to a Tenth Circuit disciplinary panel. Id. The disciplinary panel granted appellees' motion, awarded double costs and attorney fees, and remanded the case to the district court to determine the amount of attorney fees to be awarded. Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. July 18, 1995). By an order dated September 7, 1995, the district court concluded $8,640.00 in attorney fees should be awarded to the appellees, to be paid exclusively by Mr. Smith. The district court also advised Ms. Howard that Mr. Smith had been suspended from practicing law before the United States District Court for the District of Colorado, see In re Smith, No. 95-1119, 1996 WL 67191 (10th Cir. Feb. 16, 1996) (affirming district court disciplinary panel's suspension order); Howard, 164 F.R.D. at 525 (noting Mr. Smith's disciplinary status has been resolved and that he is no longer authorized to practice in the United States District Court for the District of Colorado); that

the district court would no longer accept documents signed by Mr. Smith; that she should seek new counsel; and that until she hired an attorney she would be considered to be a pro se litigant.

Both Mr. Smith and Ms. Howard appealed the September 7, 1995 order asserting a litany of errors. A jurisdictional panel of this court dismissed Ms. Howard's claims, leaving Mr. Smith as the sole appellant. Howard v. Mail-Well Envelope Co., No. 95-1428 (10th Cir. Feb. 26, 1996). The jurisdictional panel also dismissed Mr. Smith's challenge to the district court's decision to terminate his representation of Ms. Howard and to no longer accept filings signed by Mr. Smith. Id.; see Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985)(order disqualifying counsel in a civil case is not immediately appealable); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992)(revocation of permission to appear pro hac vice in a criminal case is not immediately appealable). In addition, to the extent Mr. Smith challenges the propriety of the Tenth Circuit disciplinary panel's award of double costs and attorney fees as sanctions for filing a frivolous appeal, see Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. July 18, 1995), we are without power to grant relief. See In re Smith, 10 F.3d at 724 (a three-judge panel cannot overrule the prior decision of another three-judge panel of this court). Accordingly, the only issue properly before this panel is whether the district court's calculation of the appropriate dollar amount of sanctions in the September 7, 1995, order amounted to reversible error.

II

As a threshold matter, we must determine whether we have jurisdiction over this appeal in light of the fact that Ms. Howard's case is still pending in district court. In G.J.B. & Associates, Inc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990), we "join[ed] the majority of circuit courts that have addressed the issue and [held] that a sanction order against an attorney currently of record is not a final decision for purposes of a § 1291 appeal where the underlying controversy remains unresolved." We also held such an order is not appealable under the collateral-order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), G.J.B. & Assoc., 913 F.2d at 827-29, which the Supreme Court has recently explained "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." Digital Equip. Corp. v. Desktop Direct, Inc., ____ U.S. ____, ____, 114 S.Ct. 1992, 1995 (1994)(citations omitted); Stubblefield v. Windsor Capital Group, 74 F.3d 990, 997 (10th Cir. 1996). The crux of our decision regarding the collateral-order doctrine was that the attorney may challenge the sanction order as part of an appeal from the final judgment, even if the parties settle or decline to appeal, and therefore it is not effectively unreviewable absent an interlocutory appeal. See G.J.B. & Assocs., 913 F.2d at 829 ("We reject any notion that an attorney risks losing the right to appeal if the parties settle or elect not to appeal from the final judgment"); see also Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir. 1993) (attorneys have standing to appeal orders issued

directly against them, but lack standing to appeal orders applicable only to their clients). Similarly, in Dickstein, 971 F.2d 448, we held an order revoking defense attorney Jeffrey A. Dickstein's permission to appear pro hac vice due to improper conduct was not immediately appealable, because it did not amount to a "final decision[] of the district court[]" within the meaning of 28 U.S.C. § 1291. Id. at 448. Further, as in G.J.B. & Associates, we held the challenged order was not appealable under the collateral-order doctrine because it was not effectively unreviewable through an appeal from a final judgment in the underlying case. Id. at 451. We explained that the only right defense counsel sought to vindicate in his interlocutory appeal was his reputation, which could be just as effectively rehabilitated through an appeal from a final judgment as through an interlocutory appeal, and that he did not seek to vindicate his asserted interest in continuing to represent the defendant throughout the remainder of the proceedings in the district court. Id. Most recently, in Johnson v. Board of County Comm'rs, 85 F.3d 489 (10th Cir. 1996), we exercised jurisdiction over an appeal from an order disqualifying the attorney-appellant from representing one of the parties, even though the underlying controversy had been dismissed with prejudice pursuant to a settlement agreement. We explained our cases "establish that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation.

We have no difficulty concluding the order challenged in this case does not amount to a "final decision[] of the district[] court" within the meaning of 28 U.S.C. § 1291. See Stubblefield, 74 F.3d at 995-96 (a "final decision of the district court . . . 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment'")(quoting Digital Equip., ____ U.S. ____, 114 S.Ct. at 1995 (citation and internal quotation marks omitted)). Furthermore, in light of our decisions in G.J.B. & Associates, Dickstein, and Johnson, we also conclude we lack jurisdiction over Mr. Smith's interlocutory challenge to the district court's decision under the collateral-order doctrine for three reasons: First and foremost, we see no meaningful distinction between Mr. Smith's position and that of Mr. Dickstein. As in Dickstein, Mr. Smith no longer represents a party in the litigation, but faces the stigma of a ruling that reflects negatively on his competence and conduct. However, as was also the case in Dickstein, the decision Mr. Smith now challenges may be effectively reviewed in an appeal from a final judgment, even if the parties settle their dispute or otherwise elect not to appeal.

Second, we disagree with the rationales underlying the decisions of the Third, Fifth and Seventh Circuits holding a sanction order against an attorney who no longer represents a party in the litigation is appealable under the collateral-order doctrine. See Markwell v. County of Bexar, 878 F.2d 899 (5th Cir. 1989); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 537-39 (3d Cir. 1985); Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 225-26

(7th Cir. 1984). The central thesis of these decisions is that attorneys who no longer represent parties in a case may be unable to challenge a sanction order by filing an appeal after a final judgment is entered for two reasons: first, their former clients might settle or elect not to appeal; and second, the attorney might not be notified that a final judgment has been entered given that he no longer actively participates in the litigation. Regarding the first rationale, our decisions in G.J.B. & Associates, Dickstein and Johnson make it clear an attorney may appeal a sanction or disqualification order even if his former client settles or does not appeal. Regarding the second rationale, we believe our sister circuits' analyses improperly blur the line between the impossibility of effective review necessary under the Cohen doctrine and mere inconvenience of monitoring the former client's case and performing the other tasks necessary to perfect an appeal.

Third, our cases make it clear the mere fact the sanction order in this case is currently due in full does not give rise to the type of irreparable harm justifying review under the collateral-order doctrine. In declining to adopt a blanket rule that all sanctions are immediately appealable under Cohen, this court has held, in a unanimous en banc decision, that "[a]ttorneys and parties [must] be fully aware that they must bear the burden of sanctions to the conclusion of the case and appeal on the merits of the fully adjudicated case." D&H Marketers, Inc. v. Freedom Oil & Gas, Inc., 744 F.2d 1443, 1446 (10th Cir. 1984)(en banc). We see no reason to create an exception to this general rule

and allow attorneys who no longer represent a party in the underlying case an immediate opportunity to relieve themselves of the consequences of their misconduct merely because those consequences are monetary, nor could such a holding be reconciled with our decision in G.J.B. & Assocs. We also see no reason to permit an immediate appeal under Cohen so that Mr. Smith can, without delay, attempt to somehow rehabilitate his reputation by persuading us to set aside the district court's decision. Mr. Smith's interest in promptly diminishing the stigma associated with the district court's decision is no greater than Mr. Dickstein's.

Finally, we see no basis for jurisdiction under 28 U.S.C. § 1292(a), because the challenged decision is not an injunction, or under the All Writs Statute, 28 U.S.C. § 1651, because Mr. Smith may secure adequate review through an appeal from the final judgment in the underlying case and because he has otherwise failed to make the showing required to obtain a remedy under that statute. See McNeil v. Guthrie, 945 F.2d 1163, 1165 (10th Cir. 1991)("In order to be entitled to mandamus relief, a petitioner must show a clear abuse of discretion or conduct which arbitrarily assumes and exercises authority contrary to that of the judiciary . . . Additionally, because mandamus is an extraordinary remedy, a petitioner must also show that he lacks an alternative for the relief he seeks and that his right to the writ is not in dispute"); Appeal of Licht & Semonoff, 796 F.2d 564, 573 (1st Cir. 1986)(writ of mandamus will not lie because sanction order may be reviewed on appeal from final judgment). Furthermore, the district court has not taken the steps necessary to invoke our

jurisdiction under 28 U.S.C. § 1292(b). Finally, even if we assume for the sake of discussion we would have jurisdiction if the district court had made an express finding there was "no just reason for delay" and directed entry of judgment against Mr. Smith pursuant to Fed. R. Civ. P. 54(b), which we consider to be a very great assumption indeed, the district court made no such express finding in this case.

Appeal DISMISSED. Petition for writ of mandamus or prohibition DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD, Plaintiff-Appellant-Petitioner, v. MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN, Defendants-Appellees-Respondents, and, ZITA L. WEINSHIENK, United States District Judge, Respondent. ---------- DAVID L. SMITH, Attorney-Appellant-Petitioner.	No. 95-1428 (D.C. No. 93-D-1895) (Dist. of Colo.)

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Linda C. Howard and David L. Smith hereby file their Petition for Rehearing and Suggestion for Rehearing En Banc:

I. PETITION FOR REHEARING

On July 23, 1996, a three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Anderson, Brorby and Henry, Circuit Judges) ("Disciplinary Panel II") issued its (published) opinion (copy attached hereto) dismissing for lack of jurisdiction Ms. Howard's and Mr. Smith's appeal of immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by United States District Judge Zita L. Weinshienk. These sanctions were imposed against Mr. Smith after another three-judge disciplinary panel of the Tenth Circuit (composed of Seymour, Chief Judge, Baldock and Brorby, Circuit Judges) ("Disciplinary Panel I") granted defendants-appellees' request for sanctions, imposed a sanction of double costs and attorney fees, and remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded."

In its (July 23, 1996) opinion, Disciplinary Panel II held that the immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by Judge Weinshienk were not immediately appealable under 28 U.S.C. §§ 1291, 1292(a), 1292(b), or 54(b), or under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). However, Disciplinary Panel II overlooked the fact that when Disciplinary Panel I granted defendants-appellees' request for sanctions and imposed

a sanction of double costs and attorney fees, jurisdiction over this matter was thereby vested in the Tenth Circuit. See Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990); Petuskey v. Rampton, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971). This jurisdiction was not divested when Disciplinary Panel I remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded." Id. Under these circumstances, the Tenth Circuit retained jurisdiction over this matter, and Disciplinary Panel II erred by dismissing Ms. Howard's and Mr. Smith's appeal for lack of jurisdiction.

In its (July 23, 1996) opinion, Disciplinary Panel II also denied Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, but failed to give its reasons (if any) for the denial. However, Ms. Howard and Mr. Smith had an indisputable right to a writ of mandamus or prohibition under the Tenth Circuit's holding in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975). Therefore, in the absence of any reasons for denying Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, Disciplinary Panel II deprived them of their First and Fifth Amendment right to access to the Tenth Circuit to review the actions of the district court pursuant to 28 U.S.C. § 1651 and Fed. R. Civ. P. 21.

III. SUGGESTION FOR REHEARING EN BANC

I express a belief based on a reasoned and studied professional judgment that the

panel decision is contrary to the following decisions of the Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990); Petuskey v. Rampton, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971); Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975).

I express a belief based on a reasoned and studied professional judgment that this case involves one or more questions of exceptional importance: (1) Whether the immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by Judge Weinshienk were immediately appealable under 28 U.S.C. §§ 1291, 1292(a), 1292(b), or 54(b), or under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); (2) Whether Disciplinary Panel II overlooked the fact that when Disciplinary Panel I granted defendants-appellees' request for sanctions and imposed a sanction of double costs and attorney fees, jurisdiction over this matter was thereby vested in the Tenth Circuit; (3) Whether this jurisdiction was divested when Disciplinary Panel I remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded";

(4) Whether the Tenth Circuit retained jurisdiction over this matter, and Disciplinary Panel II erred by dismissing Ms. Howard's and Mr. Smith's appeal for lack of jurisdiction; (5) Whether Ms. Howard and Mr. Smith had an indisputable right to a writ of mandamus or prohibition under the Tenth Circuit's holding in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); (6) Whether in the absence of any reasons for denying Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, Disciplinary Panel II deprived them of their First and Fifth Amendment right to access to the Tenth Circuit to review the actions of the district court pursuant to 28 U.S.C. § 1651 and Fed. R. Civ. P. 21.

Dated this 5th day of August, 1996.

Respectfully submitted,

LINDA C. HOWARD	DAVID L. SMITH
5273 Wheeling Street Denver, CO 80239 (303) 373-5666	1630 Welton Street Suite 300 Denver, CO 80202 (303) 534-0153
PLAINTIFF-APPELLANT-PETITIONER	ATTORNEY-APPELLANT-PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 1996, true and correct copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc were placed in the United States mail, postage prepaid, addressed as follows:

Zita L. Weinshienk, United States
District Judge
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Atlanta, Georgia 30303

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 95-1428
v.	)	
	)	
MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees,	)	
	)	
_____	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	

ORDER
Entered August 29, 1996

Before ANDERSON, BRORBY, AND HENRY,
Circuit Judges

This matter comes on for consideration of attorney-appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: _____

Deputy Clerk